

IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES

DDT NO. 00348 of 2009

JOHN ROY ROZYNSKI
Plaintiff

BLUESCOPE STEEL (AIS) PTY LIMITED (FORMERLY BHP STEEL (AIS) PTY LIMITED)
First Defendant/Cross-Claimant

AMACA PTY LIMITED (FORMERLY JAMES HARDIE & COY PTY LIMITED)
Second Defendant/First Cross-Defendant

WALLABY GRIP PTY LIMITED
Second Cross-Defendant

WALLABY GRIP (BAE) PTY LIMITED
Third Cross-Defendant

CONTRIBUTIONS ASSESSMENT
DETERMINATION

The plaintiff, John Roy Rozynski, sues his former employer (the first defendant), Bluescope Steel (AIS) Pty Limited (formerly BHP Steel (AIS) Pty Limited) (hereinafter called "Bluescope") and the second defendant, Amaca Pty Limited (formerly James Hardie & Coy Pty Ltd) (hereinafter called "Amaca") seeking damages for personal injuries as more fully discussed later.

Bluescope has issued a Cross-Claim against Amaca, as first cross-defendant, Wallaby Grip Pty Limited ("WG"), second cross-defendant, and Wallaby Grip (BAE) Pty Limited ("BAE"), third cross-defendant.

In his Statement of Claim the plaintiff alleges that he was exposed to asbestos dust and fibre during the course of his employment by Bluescope between a date in about 1963 and 1968 ("the Bluescope period").

The Statement of Claim further alleges he carried out construction and renovation work to his home in Brisbane, Queensland, between dates in about 1978 and about 1983 ("the Amaca period") during which work he cut, rasped, fixed and handled asbestos cement manufactured by Amaca. The products used are alleged to have included Hardiflex, Hardiplank and other asbestos cement materials. He alleges that during the course of that construction and renovation work he was exposed to and inhaled asbestos dust and fibre.

The Statement of Claim goes on to allege that as a result of his exposure to asbestos during both periods he contracted injuries alleged as, inter alia, mesothelioma which is the medical condition alleged in the Plaintiff's Statement of Particulars ("the Particulars").

Mesothelioma is an "indivisible disease" within the meaning of clause 5(7) of the *Dust Diseases Tribunal (Standard Presumptions - Apportionment) Order 2007* (hereinafter called "the Order").

The Registrar of the Dust Diseases Tribunal has appointed me as Contributions Assessor pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* ("the Regulations") and I have been asked to appoint a Single Claims Manager.

The Task of the Contributions Assessor

The task of a Contributions Assessor is set out in clause 49(4) of the Regulations which is in the following terms:-

"(4) The Contributions Assessor to whom a matter is referred is to determine the contribution that each defendant is liable to make and is to make that determination on the assumption that the defendants are liable and solely on the basis of:

- (a) the plaintiff's statement of particulars and the defendants' replies on the claim, and
- (b) standard presumptions as to apportionment determined by the Minister for the purposes of this clause by order published in the Gazette."

Clause 49(4) of the Regulation is included in Part 4 Division 5 of the Regulation as is clause 47(1) which provides that "A reference in this Division to a defendant includes a reference to a cross-defendant". Accordingly the contents of the Replies of cross-defendants are taken into account in the same way as are Replies by defendants.

The standard presumptions become relevant in circumstances where there are different categories of defendants (as to which see clause 5(2) of the Order) in the proceedings. This aspect will be mentioned later.

Exposure to Asbestos

The Bluescope Period

The Particulars specify the Bluescope period to be between 1964

and 1968 and, under a heading "Occupation, a brief description of duties and status" say:-

"Initially I was employed as a telephone technician's assistant and my job was to assist technicians with installing, repairing and maintaining the telephone system at the steelworks. After about a 12 month period I became a rigger and I undertook a course at a technical college and for the balance of my employment at AIS I worked as a rigger and had quite extensive asbestos exposure. My work as a rigger would have continued on from 1965 until 1968."

The Bluescope Reply says the plaintiff was employed by it between 29 January 1964 and 23 February 1968.

Later in the Particulars, the plaintiff says more about his exposure to asbestos. He describes exposure both during his work as a telephone technician's assistant and as a rigger. He says *"Most of my asbestos exposure I believe occurred as a rigger"*. He says that while he was a telephone technician's assistant he worked all over the enormous site at Port Kembla. He says it was common for the asbestos lagging around piping and other areas where he worked to be disturbed and that *"It was a very dusty working environment virtually all the time"*. He says that his exposure to asbestos during this period of his employment occurred on *"almost a daily basis"*.

The plaintiff *"never had to work with asbestos materials directly"* and, apparently for this reason, is not able to identify any products by name nor is he able to nominate any manufacturer of

asbestos products used.

In an overall sense, I have the clear impression that more of his exposure to asbestos resulted from already installed asbestos being disturbed or dislodged rather than exposure occurring when asbestos products were being installed.

Specifically (at paragraph 4.13) he says:-

"My exposure came from both working directly with asbestos and from working in the vicinity of others. My direct contact was not as a result of actually applying asbestos but waste asbestos lagging (that which had been removed) often was on the scaffolding and I would come in direct contact with it when dismantling scaffolding. In addition there would be a lot of asbestos in the air when lagging was being disturbed. As a telephone technician's assistant my exposure was more intermittent and from working in the vicinity of other tradesmen. I was in much more frequent proximity to asbestos lagging when working as a rigger."

Later (at paragraph 4.16) he said:-

"Others who were working in my vicinity and were handling asbestos products were involved in many different duties but a lot of the time it was general repair and maintenance or shutdown work. For example, asbestos insulation often had to be replaced on pipes and other areas and this meant that the old insulation had to be removed and the new insulation had to be applied."

Sometimes, workers would simply be involved in removing general waste (which included asbestos) from the steelworks, from the blast furnace for example. I worked around these activities."

The plaintiff's estimate is that 80% of his exposure to asbestos occurred during the Bluescope period.

The Amaca Period

The Particulars specify the Amaca period to be between 1977 and 1983 and under a heading "*Brief description of activity you were engaged in*" say:-

"I carried out home renovations to my home and this involved me installing fibro walls and ceilings using Versilux, Bevelux, Hardiflex and Hardiplank and using compressed fibro sheeting for flooring. All of the fibro we bought was manufactured by James Hardie."

Amaca concedes that it has liability for, and does not argue with the plaintiff's estimate that 20% of his exposure to asbestos occurred during, this period.

The Cross-Claim

The Cross-Claim relates only to the Bluescope period.

It is clear from the Reply to Cross-Claim filed for WG and BAE

(hereinafter called "the WG Reply") that there have been previous proceedings between Bluescope and the cross-defendants. I have read various portions of the WG Reply and annexures (being statements and previous contributions assessments).

In particular, I mention the fact that Bluescope has been found variously to be either only a Category 2 defendant or both a Category 1 and a Category 2 defendant.

Categories of Defendants

All parties to the proceedings agree that WG, BAE and Amaca are Category 1 defendants as specified in clause 5(2) (a) of the Order.

There is no agreement as to the category of defendant into which Bluescope ought be placed.

Clause 5(2) of the Order provides:-

"(2) For the purposes of determining the apportionment, the Contributions Assessor is to determine into which of the two categories each defendant falls (except for any defendant that is to be excluded from the apportionment, as agreed by the defendants). The two categories are:

- (a) Category 1 which includes all those corporations, authorities, and legal entities who engage in a business which relates to the period of exposure and which can be described as Miners, Manufacturers, Suppliers and/or*

Installers¹⁰ of asbestos or of products, plant and equipment which contained asbestos¹¹, and

- (b) *Category 2 which includes all other defendants. These would ordinarily be all corporations, authorities, and legal entities who engage in a business which relates to the period of exposure and which can be described as Users of asbestos or products, plant and equipment which contained asbestos, Occupiers of Premises which contained asbestos or where asbestos or products, plant and equipment which contained asbestos were situated or Employers of staff who in the course of, or as an incident to, their employment were exposed to asbestos.*

Note.

- 10 *It is not intended to include retail shops or outlets within the meaning of the term Supplier in Category 1. Retail shops or outlets are included in Category 2. Similarly, it is not intended to include a user of asbestos products, such as a small building company, which uses bonded asbestos sheeting in building works.*
- 11 *For example, the category of installer would include the designer and manufacturer of particular plant or equipment which included asbestos as part of its design, as well as a company which is engaged to install the plant in accordance with the manufacturer's instructions."*

Notes 10 and 11 purport to furnish direct guidance as to facts to be taken into account in determining who is to be classified as an "Installer" and in what circumstances. In this respect, therefore, I read Notes 10 and 11 as if they form part of the Order.

It is not in issue that Bluescope, engaged in the installation of asbestos. The fact that it engaged in installation of asbestos does not automatically result in its being classified as a Category 1 defendant. It will not be so classified if, for instance according to Note 10, it was a "*a small building company, which uses bonded asbestos in building works*". I am unable to infer or conclude that a corporation of the magnitude of Bluescope (or its predecessor) could have been so classified or described during the Bluescope period.

Although there is no material of assistance on the subject, and if it be relevant, I would have thought that Bluescope's predecessor may well have been "*the designer plant ... which included asbestos*" being the plant installed and maintained at the steelworks.

The question of into which Category or Categories of defendant has been the subject of close examination as earlier mentioned.

The material I have persuades that Bluescope ought to be classified as a Category 1 defendant and I make that classification.

As it was the employer of the plaintiff, Bluescope is also a Category 2 defendant.

Clause 5(3) of the Order provides:-

"(3) If a defendant, in any particular case, falls within both categories (ie as an installer and employer of the claimant) then a separate share is to be calculated by the Contributions Assessor for the role of that defendant which falls within each category."

The Standard Presumptions

The Bluescope period falls within Period B as prescribed by clause 5(1) of the Order. The Standard Presumption for Period B requires liability to be apportioned between Category 1 and Category 2 in the ratio of 65% to 35% respectively unless varied (by increase or decrease) within the limit of 20 percentage points.

In its Reply Bluescope concedes *"that during the period of employment from 1964 to 1968 it knew or ought to have known that exposure to asbestos could give rise to a risk of personal injury but does not concede that it did or ought to have had this knowledge for the entirety of this period"*.

In light of the fact that a Contributions Assessor is required to assume that defendants are liable, it seems to me that I should treat the Bluescope concession as applying to the whole of the Bluescope period.

In the circumstances I will increase the percentage liability of

Bluescope as a Category 2 defendant by 20 percentage points (with a corresponding decrease in the percentage liability of Category 1 defendants). I determine the ratio between Category 1 and Category 2 defendants (as varied) to be a ratio of 45% to 55% respectively.

Determination of Liability during the Bluescope period

During this period the Category 1 defendants are Bluescope, Amaca, WG and BAE with Bluescope being also a Category 2 defendant.

Clause 5(4) of the Order provides:-

"(4) If there is more than one defendant in either of Category 1 and Category 2, then the Contributions Assessor is to treat each defendant as equal in contribution to the percent share of that Category unless satisfied that a variable contribution ought apply."

The material upon which I am required to make a determination does suggest that there might be grounds, if more was known, for the making of a variable contribution. However, in the absence of further information than is contained in the documents upon which I must proceed, I am not satisfied that a variable contribution ought apply and in my determination of liability I will treat each Category 1 defendant as equal.

The joint Reply filed for WG and BAE asserts that at no stage did WG and BAE "operate simultaneously" and that, therefore, they should be treated as one entity. It seems to me that no injustice will be done by taking up that suggestion.

Accordingly, during the Bluescope period there are three Category 1 defendants (being Bluescope, Amaca and WG/BAE) and one category 2 defendant.

In order to maintain the ratio of 45:55 as between Category 1 defendants and the Category 2 defendant I determine that each Category 1 defendant will be liable for 23.7% of the Bluescope period while the Category 2 defendant will be liable for 28.9%. When these percentages are applied to the 80% of liability attaching to the Bluescope period, each Category 1 defendant will be liable for $(23.7\% \times 80)$ 18.96% while the Category 2 defendant will be liable for $(28.9\% \times 80)$ 23.12%.

Liability during the Amaca period

Amaca is liable for 20% of liability for this period.

In Summary

Bluescope is determined to be liable for $(18.96 + 23.12)$ 42.08%, Amaca $(18.96 + 20)$ 38.96% while the joint liability of WG/BAE is 18.96%.

I appoint Bluescope as Single Claims Manager.

Dated: 22nd March 2010

Peter O'Connor

Contributions Assessor